

LANAK & HANNA, P.C.

MICHAEL K. MURRAY (265785)

mkmurray@lanak-hanna.com

625 The City Drive South, Suite 190

Orange, California 92868

Telephone: (714) 550-0418

Facsimile: (714) 703-1610

YOUNG BASILE HANLON & MACFARLANE, P.C.

JEFFREY D. WILSON (P56376)

wilson@youngbasile.com

MICHAEL M. JACOB (P15391)

jacob@youngbasile.com

EDDIE D. WOODWORTH (OHIO: 90833)

woodworth@youngbasile.com

3001 W. Big Beaver Road, Ste. 624

Troy, Michigan 48084

Telephone: (248) 649-3333

Facsimile: (248) 649-3338

Attorneys for Plaintiff/Counter-Defendant
The Sherwin-Williams Company,
f/k/a Sherwin-Williams Automotive Finishes Corp.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE SHERWIN-WILLIAMS
COMPANY, f/k/a SHERWIN-WILLIAMS
AUTOMOTIVE FINISHES CORP.,

Plaintiff,

vs.

JB COLLISION SERVICES, INC., dba
J&M AUTOBODY, and d/b/a EL
DORADO COLLISION; and DOES 1
through 10, inclusive,

Defendants.

AND RELATED COUNTER-CLAIMS

) Case No.: 13-CV-1946 LAB (WVG)
) *Consolidated with*
) Case No.: 13-CV-1947 LAB (WVG)

) Hearing Date: February 19, 2016
) Hearing Time: 3:00 p.m.
) Hearing Location: Courtroom 14A
) Judge: Hon. Larry A. Burns

1 THE SHERWIN-WILLIAMS)
2 COMPANY, d/b/a SHERWIN-)
3 WILLIAMS AUTOMOTIVE FINISHES,)
4)
5 Plaintiff,)
6)
7 vs.)
8 JJT, INC. d/b/a JOHN'S COLLISION)
9 CENTER; JOHN TYCZKI, and individual;)
10 and DOES 1 through 10, inclusive,)
11)
12 Defendants.)
13 AND RELATED COUNTER-CLAIMS)
14)
15)
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**PLAINTIFF'S NOTICE OF MOTION AND MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S RENEWED
MOTION FOR JUDGMENT AS A MATTER OF LAW OR
ALTERNATIVELY A REMITTITUR OF DAMAGES/NEW TRIAL**

TO ALL PARTIES AND THEIR ATTORNEY(S) OF RECORD:

Please take notice that on February 19, 2016 at 3:00 p.m., or as soon thereafter as may be heard in Courtroom 14A, of the United States District Court, Southern District of California, Counter-Defendant, The Sherwin-Williams Company, f/k/a Sherwin-Williams Automotive Finishes Corp. ("Plaintiff" or "Sherwin-Williams") will and hereby does, renew its Motion for Judgment as a Matter of Law, pursuant to Rule 50 of the Federal Rules of Civil Procedure.

This Motion is brought on the grounds that Defendants failed to present substantial evidence of essential elements of its Fraud Claims, namely fraudulent inducement and damages. This Motion is brought on the alternate grounds that a remittitur is warranted because the damages awarded by the Jury were excessive and not supported by the evidence presented at trial. This Motion is brought on the additional alternate grounds that a new trial is warranted, as to the Fraud Claims only, due to attorney misconduct throughout the trial and closing argument.

This motion is based on this Notice and Motion, the Memorandum of Points and Authorities filed concurrently herewith, and the pleadings, records and files of the within action, and upon such further evidence and argument as may be submitted at the time of hearing.

DATED: January 15, 2016

Respectfully submitted,
**YOUNG BASILE HANLON &
 MACFARLANE, PC**

By: /s/ Jeffrey D. Wilson
 Jeffrey D. Wilson (*pro hac vice*)
 Michael M. Jacob (*pro hac vice*)
 Eddie D. Woodworth (*pro hac vice*)
Attorneys for The Sherwin-Williams Company

LANAK & HANNA, P.C.
MICHAEL K. MURRAY (265785)
mkmurray@lanak-hanna.com
625 The City Drive South, Suite 190
Orange, California 92868
Telephone: (714) 550-0418
Facsimile: (714) 703-1610

YOUNG BASILE HANLON & MACFARLANE, P.C.
JEFFREY D. WILSON (P56376)
wilson@youngbasile.com
MICHAEL M. JACOB (P15391)
jacob@youngbasile.com
EDDIE D. WOODWORTH (OHIO: 90833)
woodworth@youngbasile.com
3001 W. Big Beaver Road, Ste. 624
Troy, Michigan 48084
Telephone: (248) 649-3333
Facsimile: (248) 649-3338

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5 vs.)

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7 CENTER; JOHN TYCZKI, and individual;)
8 and DOES 1 through 10, inclusive,)

9 Defendants.)

10 AND RELATED COUNTER-CLAIMS)
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW
OR ALTERNATIVELY A REMITTITUR OF DAMAGES/NEW TRIAL**

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I. INTRODUCTION

Plaintiff, The Sherwin-Williams Company (“Plaintiff” or “Sherwin-Williams”) hereby renews its Motion for Judgment as a Matter of Law, or in the alternative, seeks a remittitur/new trial on Defendants’ JB Collision Services, Inc, JJT, Inc., and John Tyczki (collectively, “Defendants”) counterclaims for Concealment, Intentional Misrepresentation, and Negligent Misrepresentation (the “Fraud Claims”) pursuant to Federal Rules of Civil Procedure 50 and 59. Defendants have been fully heard on these issues at trial, and the evidence presented fails to establish that Plaintiff acted fraudulently, or that Plaintiff’s conduct caused Defendants any damage.

II. FACTUAL/PROCEDURAL BACKGROUND

Procedural background of the matter is required to provide context to the instant Motion. In August 2013, Plaintiff filed its Complaint in this matter against Defendants alleging breach of contract. DE 1. In October 2013, Defendants filed counterclaims against Plaintiff, which were most recently amended in June 2014. DE 36 (the “Second Amended Counterclaims” or “SACC”). The SACC contains six counterclaims, including two claims for breach of contract, the three Fraud Claims, and unjust enrichment.

On November 17, 2015, this Court entertained a four-day jury trial. After the close of Defendants’ case-in-chief, Plaintiff moved pursuant to Rule 50(a) for judgment as a matter of law. DE 280, Trial Tr. Day 4 at 64:9-65:17. Specifically, Plaintiff argued that 1) Defendants have not established fraudulent inducement,¹ and 2) Defendants have failed to present competent evidence of damages. This Court submitted the matters to the jury. In doing so, this Court noted that in the event of an adverse verdict, Plaintiff could get the transcript and “convince [the Court] that this was wrong, at this time there was not sufficient evidence.” DE 280, Trial Tr. Day 4 at 122:11-19.

At the conclusion of the jury trial, the Jury returned a verdict in favor of Plaintiff on its breach of contract claims, and awarded Plaintiff 100% of its claimed damages. DE

¹ As discussed below, without competent evidence of fraudulent inducement, Defendants fraud claims fail as a matter of law under the economic loss doctrine. *E.g.* DE 56.

266. In so concluding, the Jury found that Sherwin-Williams “substantially performed its duties under the Supply Agreements.” DE 266 at 2-3. With respect to Defendants’ contract and unjust claims, the Jury found in favor of Plaintiff. With respect to the Fraud Claims, the Jury found for Defendants in the amount of \$3,250,000.00 (\$750,000 for concealment; \$1,250,000 for intentional misrepresentation, and \$1,250,000 for negligent misrepresentation). On January 11, 2016, this Court entered judgment. DE 282.

III. LEGAL STANDARD

A. Judgment as a Matter of Law Under Rule 50

“Rule 50 requires a party seeking judgment as a matter of law to file a Rule 50(a) motion at any time before the case is submitted to the jury. If the jury later returns a verdict against the moving party, this party may then file a Rule 50(b) motion for judgment as a matter of law.” *Tortu v. Las Vegas Metro. Police Dep’t*, 556 F.3d 1075, 1081 (9th Cir. 2009). “A party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion” *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003); *Tortu*, 556 F.3d at 108.

Under Rule 50, the question is whether, in “construing the evidence in the light most favorable to the police, the jury’s defense verdict was supported by substantial evidence.” *Fisher v. City of San Jose*, 558 F.3d 1069, 1074 (9th Cir. 2009). For purposes of a 50(b) standard, “substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id* at 1074.

“In ruling on a JMOL, the Court may not make credibility determinations or weigh the evidence, as these are jury functions.” *S. California Stroke Rehab. Associates, Inc. v. Nautilus, Inc.*, 2012 WL 4364144, at *1 (S.D. Cal. 2012). “Judgment as a matter of law is appropriate when, taking the evidence as a whole and construing it in the light most favorable to the nonmoving party, a reasonable juror could reach only one conclusion.” *Sharp v. Donahoe*, 2013 WL 3367557, at *1 (S.D. Cal. 2013) (Burns, J.). Appeals courts review *de novo* a district court’s renewed JMOL decision. *Fisher*, 558 F.3d at 1074.

B. New Trial Under Rule 59

“Under Federal Rule of Civil Procedure 59, a district court has the discretion to grant a new trial “for any reason for which a new trial has heretofore been granted in an action at law in federal court.” *Cotton ex rel. McClure v. City of Eureka*, Cal., 860 F. Supp. 2d 999, 1008 (N.D. Cal. 2012). “The trial court may grant a new trial only if the jury's verdict was against the clear weight of the evidence.” *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009). An Appellate Court “will uphold a district court's grant of a new trial if any of its grounds for granting the new trial are reasonable.” *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001). “Historically recognized grounds include, but are not limited to, claims that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving.” *Cataphora Inc. v. Parker*, 2011 WL 6778792, at *4 (N.D. Cal. 2011).

“Unlike with a Rule 50 determination, the district court, in considering a Rule 59 motion for new trial, is not required to view the trial evidence in the light most favorable to the verdict. Instead, the district court can weigh the evidence and assess the credibility of the witnesses.” *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014). “The district court also is not limited to the grounds a party asserts to justify a new trial, but may *sua sponte* raise its own concerns about the damages verdict.” *Id.*

IV. ARGUMENT

A. Defendants Did Not Present Substantial Evidence Of Essential Elements Of Their Fraud Claims

1. Fraudulent Inducement

At the close of Defendants’ proofs, Plaintiff moved pursuant to Rule 50(a) for judgment as a matter of law on the basis that Defendants did not offer evidence sufficient to support their fraudulent inducement claims. Specifically, Defendants have argued throughout this lawsuit that they were induced to enter into the agreements, and then

1 induced to not terminate the agreements. DE 280, Trial Tr. Day 4 at 68:23-69:6. At
 2 argument on the issue of fraudulent inducement, this Court identified three specific
 3 instances of alleged fraudulent inducement sufficient to submit the matter to the jury:

- 4 1. That Defendants were fraudulently induced into the second agreement by alleged
 5 promises of an \$80,000 Advance instead of the \$40,000 Advance Defendants
 6 ultimately received. DE 280, Trial Tr. Day 4 at 69:7-76:20.
- 7 2. That Defendants were “the only ones” experiencing the defects that they
 8 complained of. DE 280, Trial Tr. Day 4 at 121:1-19.
- 9 3. That Jose Garcia continued to promise that Sherwin-Williams was working on a
 10 solution to fix Defendants’ problems. DE 280, Trial Tr. Day 4 at 121:20-122:4.

11 The elements of a claim of fraudulent inducement to enter into a contract are “(a) a
 12 misrepresentation, false representation, concealment or nondisclosure; (b) knowledge of
 13 falsity; (c) intent to defraud or to induce plaintiff to enter into a contract or breach a
 14 contract; (d) justifiable reliance; and (e) resulting damage.” *Benefield v. Bryco Funding,*
 15 *Inc.*, 2014 WL 4060252 (N.D. Cal. 2014).² The elements of fraudulent concealment are:
 16 (a) concealment of a fact; (b) duty to disclose the fact; (c) concealment with intent to
 17 defraud; (d) plaintiff’s unawareness of the fact; and (e) damages resulting from the
 18 concealment. *See Hovsepian v. Apple, Inc.*, 2009 WL 2591445 (N.D. Cal. August 21,
 19 2009). The elements of intentional misrepresentation are (a) misrepresentation (false
 20 representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) intent to
 21 defraud; (d) justifiable reliance; and (e) resulting damage. *See Kaldenbach v. Mutual of*
 22 *Omaha Life Ins. Co.*, 178 Cal. App. 4th 830, 850 (2009) *citing Lazar v. Superior Court*,
 23 12 Cal. 4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 (1996). The elements of negligent
 24 misrepresentation are (1) misrepresentation of a material fact, (2) without reasonable

25 ² This Court has previously ruled that fraudulent inducement is necessary for Defendants
 26 to survive application of California’s economic loss rule. *E.g.* DE 56. “California courts
 27 have rejected the theory that a party duped into performing an existing contractual
 28 obligation has suffered damage.” *B. Braun Med., Inc. v. Rogers*, 163 F. App’x 500, 508
 (9th Cir. 2006)

ground for believing it to be true, (3) with intent to induce another's reliance, (4) justifiable reliance, and (5) resulting damage. *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243, (DCA 2007).

2. Unpled Allegations

As to the first two instances of inducement (the \$80,000/\$40,000 switch, and that Defendants were the “only ones”), Plaintiff pointed out that throughout two years of litigation, Defendants have never pled these allegations as a basis to support their fraudulent inducement claim. DE 280, Trial Tr. Day 4 at 70:13-73:19; 121:1-123:19. On the record, this Court asked Defendants to specify where in the Second Amended Counterclaims they alleged the \$80,000/\$40,000 switch. DE 280, Trial Tr. Day 4 at 70:13-73:19. When Defendants’ counsel could not find any such allegation, this Court stated:

All right. Yeah, okay. Well, tell me, point some evidence that would support a jury, a rational jury finding fraud here. I mean I'm buffeted here, Mr. Sorrentino, because it's apparent to me that the problems with the paint were already known to Mr. Tyczki at the time he entered into the JJT contract, some of those problems had begun to emerge; so to say I was misled about the quality of the paint is little late in the day. It seems to me from the evidence that the driving motivation entering into the second contract was the up-front money. Turned out to be less than what he wanted, but now you tell me that even when you pled this, you knew it was 40,000, not 80,000, so that can't be the basis for the the fraud claim either.

DE 280, Trial Tr. Day 4 at 73:20-74:7. Defendants’ inability to identify any citation in their Second Amended Counterclaims for the \$80,000/\$40,000 switch as a basis for fraud is easily explained. DE 280, Trial Tr. Day 4 at 70:13-76:20. It was never previously pled.

Similarly, Defendants never pled that they were fraudulently induced by supposed comments by Plaintiff that Defendants were the “only ones” experiencing any appearance defects. Moreover, at no point in this two-year litigation did Defendants move to amend their counterclaims to add this alleged misrepresentation as a claim for fraud, nor did they make a motion to conform the pleadings to the proofs.

1 Rather, the thrust of Defendants' counterclaims from the inception of this lawsuit
 2 has been that Sherwin-Williams misrepresented the quality of its paint, and then told
 3 Defendants that it was working on a solution to fix it. *See generally* DE 36 (describing
 4 various alleged misrepresentations). Through three (3) iterations of their counterclaims,
 5 Defendants have been required to clarify the fraud allegations in response to a Rule
 6 12(b)(6) motion (which was brought in part pursuant to Rule 9(b)),³ and at no point
 7 during these three iterations did Defendants identify the "\$80,000/\$40,000 switch" or the
 8 "only ones" allegation as a basis to support their fraud claims.

9 In fact, the first and only time Defendants raise the "only ones" allegation in this
 10 lawsuit is through a passing, uncited reference in response to a Summary Judgment
 11 Motion. DE 143. Accordingly, Plaintiff respectfully submits that these allegations cannot
 12 serve as a basis for fraud. *See In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050, at *18
 13 (N.D. Cal. 2009) (refusing to allow Plaintiff to rely on unpled fraud theory in securities
 14 fraud case in response to summary judgment motion); *Scott v. Wells Fargo Bank, N.A.*,
 15 2011 WL 3837077, at *10 (D. Minn. 2011) ("Plaintiff cannot, late into the litigation of
 16 this matter, assert unpled allegations in an effort to avoid summary judgment, especially
 17 given the requirement that allegations of fraud be pled with particularity"); *CSX Transp.*
 18 *Inc. v. Gilkison*, 2007 WL 1795620, at *4 (N.D.W. Va. 2007) (rejecting unpled fraud
 19 claims on 12(c) motion: "The clear intent of Rule 9(b) is to eliminate fraud actions in
 20 which all the facts are learned through discovery after the complaint is filed.").

21 Indeed, Plaintiff submits that the Jury's inconsistent verdict was the product of
 22 these and other unpled "fraud" allegations. Here, the Jury found that Sherwin-Williams
 23 made misrepresentations about the quality of its paints sold to Defendants under the
 24 contracts, but also found that "Sherwin-Williams substantially performed its duties under

25 ³ Fed. R. Civ. P. 9(b) provides that "In alleging fraud or mistake, a party must state with
 26 particularity the circumstances constituting fraud or mistake." The Ninth Circuit has held
 27 that a party alleging fraud must include the "who, what, when, where, and how" of the
 28 fraud. *Castaneda v. Saxon Mortgage Servs., Inc.*, 687 F. Supp. 2d 1191, 1199 (E.D. Cal.
 2009) (*quoting Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)).

1 the Supply Agreements.” DE 266 at 2-3. This inconsistency is additional reason to
2 conclude that the Jury relied upon one of the unpled allegations in returning their verdict.

3 **B. Defendants Did not Present Substantial Evidence That The Alleged**
4 **Fraud Was False or Caused Non-Speculative Damages**

5 Alternatively, Defendants are left with the allegation that that they have made from
6 the outset: that Sherwin-Williams misrepresented the quality of its products, and then
7 misrepresented its efforts to cure the defects. As to the first point, this Court has already
8 noted that if defects in the paint existed, they were known to Defendants since September
9 2008. Those claims are clearly time-barred. As such, the only actionable fraud claims
10 actually pled by Defendants are purported false assurances that Sherwin-Williams was
11 working to fix its quality problems.

12 But, Defendants have offered no evidence to support the falsity of this statement.
13 In other words, even if evidence was offered by Defendants that Sherwin-Williams
14 actually told Defendants that it was working on a solution or “fix” to the alleged defects
15 in its paint, Defendants never offered evidence that this representation was in fact not
16 true. At most, Defendants provided evidence that Sherwin-Williams said it was trying to
17 fix its paint and Defendants relied on those statements to continue purchasing paint
18 products as required by contract. Defendants did not prove that Sherwin-Williams was
19 not trying to fix its paint. This is an essential element of their inducement claims, yet
20 Defendants failed to identify any evidence that such statements were false when made.⁴

21 Moreover, and with respect to all three instances of fraudulent inducement
22 (\$80,000/\$40,000 switch, “only ones,” and “efforts to cure defects”), Defendants have
23 identified no evidence of causation to their damages. “Under California law, a complete
24 causal relationship between the fraud or deceit and the plaintiff's damages is required.”
25

26 ⁴ To the contrary, Defendants introduced testimony from their expert claiming that
27 Sherwin-Williams’ testing documents show the Company’s attempts to improve the
28 product’s performance in high humidity environments. DE 279, Trial Tr. Day 3 at
224:19-252:25.

1 *City Sols., Inc. v. Clear Channel Commc'ns*, 365 F.3d 835, 840 (9th Cir. 2004); *B. Braun*
 2 *Med., Inc. v. Rogers*, 163 F. App'x 500, 507 (9th Cir. 2006) (*citing Kruse v. Bank of*
 3 *America*, 202 Cal.App.3d 38 (1988) (“Under California law, it is axiomatic that to obtain
 4 a recovery for fraud, a claimant must prove, inter alia, that damages were sustained as a
 5 proximate cause of the fraudulent conduct. Deception without resulting loss is not
 6 actionable fraud.”); *See also Service by Medallion, Inc. v. Clorox Co.*, 44 Cal.App.4th
 7 1807, 1818 (Cal.App.1996)). Here, Defendants failed to present any evidence of the link
 8 between the misrepresentations, and their damages of needing to repaint every vehicle.

9 It is well settled that a false statement and causation are essential elements of
 10 Defendants’ Fraud Claims. *See* Section IV(a)(1). When the nonmoving party bears the
 11 burden of proof, as Defendants do with their claims, the court should grant judgment
 12 where there has been a “complete failure of a proof concerning an essential element.”
 13 *See, e.g. Asetek Holdings, Inc. v. CoolIT Sys., Inc.*, 2014 WL 4090400 (N.D. Cal. 2014).
 14 Since Defendants have failed to prove these elements, the Fraud Claims cannot stand.

15 **C. Defendants’ Fraud Claims Fail Under the Economic Loss Rule**

16 Plaintiff further submits that Defendants’ fraud claims fail under the economic loss
 17 rule. Specifically, Defendants have not put forth substantial evidence to support a finding
 18 that they were “induced” to not terminate the contracts. Indeed, Defendants admitted that
 19 they would not have left the contracts when they did had he known he had not completed
 20 the agreement. *E.g.* DE 279, Trial Tr. Day 3 at 327:25-328:23.

21 Generally, a Plaintiff in California under the economic loss rule may not recover in
 22 tort for the breach of duties that merely restate contractual obligations. *Aas v. Superior*
 23 *Court*, 12 P.3d 1125, 1135 (Cal. 2000). Quite simply, the economic loss rule “prevent[s]
 24 the law of contract and the law of tort from dissolving one into the other.” *Robinson*
 25 *Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988, 102 P.3d 268, 273 (Cal. 2004).
 26 Plaintiff submits that Defendant’s claims are similar to *Oracle USA, Inc. v. XL Global*
 27 *Servs., Inc.*, 2009 WL 2084154 (N.D. Cal. 2009). In *Oracle USA*, the court noted that:
 28

1 In summary, the fundamental rule in California is that no tort cause of action
 2 will lie where the breach of duty is nothing more than a violation of a
 3 promise which undermines the expectations of the parties to an agreement.
 4 Exceptions have been permitted only where: a breach of duty causes a
 5 physical injury; the covenant of good faith and fair dealing is breached in an
 6 insurance contract; an employee was wrongfully discharged in violation of a
 7 fundamental public policy; or a contract was fraudulently induced.

8 *Id.* The *Oracle* court went on to hold that the defendant's failure to pay for services
 9 rendered by the plaintiff was quintessentially economic in nature. *Id.* Indeed, the *Oracle*
 10 plaintiff even alleged that the defendant's promises of payment induced it to provide
 11 additional services that it would not have provided, but for the misrepresentations, and
 12 the Court still held that the plaintiff's claim was economic in nature. Moreover, the court
 13 noted that the defendant's breach did not expose the plaintiff to the possibility of physical
 14 injury, or to any third party for physical injury or other loss resulting from the
 15 defendant's conduct.

16 In other words, the *Oracle* defendant promised to perform on its contract
 17 obligations, but failed to do so, and the breach of the defendant's promise did not create a
 18 risk of physical injury or loss. This is precisely what Defendants argue—that Sherwin-
 19 Williams sold defective paint. Defendants did not offer substantial evidence of a risk of
 20 physical injury or loss. Accordingly, Judgment as a matter of law is appropriate.

21 **D. Defendants Have Not Identified Competent Evidence of Damages**

22 In addition to not establishing fraudulent inducement, Defendants failed to identify
 23 competent damages evidence, and instead offered only speculative/contingent damages.
 24 Accordingly, Plaintiff moved pursuant to Rule 50(a) on the basis that Defendants have
 25 not identified cognizable damages. DE 280, Trial Tr. Day 4 at 64:9-65:19.

26 “It is fundamental that damages which are speculative, remote, imaginary,
 27 contingent, or merely possible cannot serve as a legal basis for recovery.” *Earp v.*
 28 *Nobmann*, 122 Cal. App. 3d 270, 294 (Cal. Ct. App. 1981) *disapproved of on other*
grounds by Silberg v. Anderson, 50 Cal. 3d 205 (Cal. 1990); *B. Braun Med., Inc. v.*
Rogers, 163 F. App'x 500, 508 (9th Cir. 2006) (“Under California law, speculative fraud

1 damages are not actionable”). Accordingly, the Jury was instructed that it “may only
 2 award damages in amounts that are reasonably certain and have been proved by a
 3 preponderance of evidence -- of the evidence. You may not award damages that are
 4 remote or that require you to speculate.” *E.g.* DE 280, Trial Tr. Day 4 at 169:8-11.

5 Because speculative damages are not compensable, California law closely
 6 scrutinizes damage theories based upon *potential* third party liability. “Under California
 7 law, a plaintiff—whether the plaintiff's claim sounds in contract or tort—generally cannot
 8 recover damages alleged to arise from a third-party claim against the plaintiff when
 9 caused by the defendant's misconduct.” *Green Wood Indus. Co. v. Forceman Int'l Dev.*
 10 *Grp., Inc.*, 156 Cal. App. 4th 766 (Cal. Ct. App. 2007). Indeed, “the mere possibility that
 11 one will be required to pay damages to a third party does not warrant even nominal
 12 damages.” *Walker v. Pac. Indem. Co.*, 183 Cal. App. 2d 513, 517 (Cal. Ct. App. 1960).
 13 “Damages that result from a liability to a third party are not recoverable unless the party
 14 seeking the damages proves to a reasonable certainty that the liability could and would be
 15 enforced by the third party [that is,] that the party seeking the damages “could and would
 16 satisfy the obligation.” *U.S. ex rel. Belt Con Const., Inc. v. Metric Const. Co.*, 314 F.
 17 App'x 151, 155 (10th Cir. 2009) (*quoting Green Wood*, 67 Cal. Rptr. 3d at 632) (applying
 18 California law). Accordingly, “[i]t may be that existing California authorities generally
 19 require payment of the liability in order to include the liability as damages. “But even if a
 20 liability to a third party might be included as damages without actual payment, more
 21 certainty is necessary than just evidence of an obligation to pay a third party.” *Green*
 22 *Wood*, 156 Cal. App. 4th at 777-78.

23 Throughout this lawsuit, Defendants have tossed around a variety of damage
 24 figures exceeding \$20 million. *E.g.* DE 280, Trial Tr. Day 4 at 53:18-55:13; DE 36. This
 25 cocktail napkin valuation contemplates that a total of 10,000 cars were painted with the
 26 AWX paint system from 2008 to 2013, and each vehicle costs, on average \$2,000.00 to
 27 repaint. *E.g.* DE 280, Trial Tr. Day 4 at 53:18-55:13. In other words, Defendants admit
 28 that they are speculating that 9,960 vehicles they painted 3 to 8 years ago might someday

1 need a \$2,000 repair due to alleged gloss problems about which said owners never
2 complained.

3 During trial, Defendants “revised” their damages calculation, and offered
4 Defendant Tyczki’s unsupported testimony that on average, each vehicle costs \$3,200.00
5 to repaint. *E.g.* DE 280, Trial Tr. Day 4 at 53:18-55:13.⁵ In other words, Defendants were
6 now seeking \$32 million. Defendants have conceded that they do not know if all 10,000
7 cars need to be repaired, and submitted no evidence to this point. *E.g.* DE 280, Trial Tr.
8 Day 4 at 53:18-55:13. Defendants also conceded that if there was no paint defects on the
9 vehicle (e.g. dieback, sanding scratches, solvent popping, etc.), then a repair would be
10 unwarranted. *E.g.* DE 280, Trial Tr. Day 4 at 53:18-55:13. Defendants also put forth no
11 evidence as to whether all 10,000 vehicles (some of which were painted seven years ago)
12 were still even on the road. Finally, Defendants conceded that they have not hired an
13 expert to verify or attest to their damages calculation. *E.g.* DE 279, Trial Tr. Day 3 at
14 337:25-338:2.

15 Since this lawsuit was filed, Defendants have submitted approximately 40 warranty
16 claims valuing approximately \$120,000. Based on these 40 claims, as well as anecdotal
17 and highly suspect allegations of an additional 100 vehicles repainted during the 4½ years
18 of the parties’ contracts (which Defendants have repeatedly assured that they are not
19 claiming damages for (*e.g.* DE 223)), Defendants assumed that every vehicle they painted
20 with AWX will be repainted under the warranty. During argument on Plaintiff’s Motion,
21 this Court recognized the problematic nature of Defendants’ damages theory:

22 Now, the question is is it likely or credible that he's going to have to repaint
23 every one of those cars. I think the answer to that is probably no. I mean for
24 one thing, you know, he can do it as a good will gesture if he wants. He has
25 testified that he's concerned about the reputation of his business, that he's not
26 going to wait for customers necessarily to contact him, he's going to offer
repaints if they come in. But it's still unlikely in my judgment that 10,000

27 ⁵ To the extent that Defendants base their \$3,200 estimate on warranty claim estimates
28 created after the lawsuit began, this new estimate is a grossly implausible extrapolation of
the cost of repainting 9,960 cars based on disputed estimates of only 40 repaints.

would come in. It's not even clear that those 10,000 cars are still on the road, still being driven around; that would be very unlikely. So I do have some question about whether the damages that they're seeking can be sustained. But I also have the option to see what a reasonable jury would do, and if it doesn't comport with my view of the evidence, then I can always reduce it by remittitur, you know, based on factors that I'm talking about. Now, I'm hesitant to do that going into the case, and I don't think that comports with the Rule 50 standard for me to say well, I'm going to limit you to \$10 million in damages or \$8 million in damages. Suffice it to say the formula that the defense has raised on their claims for damages is problematic, it has problems.

DE 280, Trial Tr. Day 4 at 67:4-25.

In *B. Braun Med., Inc. v. Rogers*, 163 F. App'x 500, 508 (9th Cir. 2006), the Ninth Circuit held that a district court erred when it did not grant judgment as a matter of law as to a fraud claim because the plaintiff failed to demonstrate specific evidence of damages. Rather, counsel conceded in his closing argument that calculating damages was “tough.” *Id.* Previously acknowledging that he did not have an expert, plaintiff’s counsel argued:

I'm going to have to leave it to your good judgment to figure out what the damage award should be. What is it—you know, and you're allowed broad latitude in this endeavor. If an inventor has a dream and he's successful and he puts out a wonderful product, the patent—I'm not saying the device itself but that patent that can be useful, and he's deprived of its use, what is that worth on an independent basis from everything else you've heard. I don't know that I'm even so much talking about the strict economic value as much as the rest of it, the value of getting the satisfaction of the recognition of yourself as someone who made a significant contribution into the world.

That 114 patent had significant value. We know that. In 1992 they were willing to pay \$300,000 plus 250—right at—350 plus 250 right up front. It had significant value. **Where could he have gone? What could he have sold it for? I don't think this is going to be a big number. We saw big numbers. This is not going to be a number in that magnitude.**

But I would submit to you that it's also not a small thing. It should not be demeaned or diminished. I think myself your damage award for fraud should be in the area of \$1,000,000. I think it should be enough to let Braun know that they shouldn't play with their power, that they

1 **can't be one of the 800-pound gorillas.** I told you not to punish them as a
2 corporation. In fact, punishment would come later if we get to that stage, but
3 don't let them walk around with impunity just because they're big. Treat
4 them by the same standards that you'd treat other human beings.

5 *Id.* at 507-08 (emphasis added). In reversing the district court's denial of judgment as a
6 matter of law, the Ninth Circuit noted: "counsel implied in his closing argument—and
7 Rozi now argues on appeal—that Rozi would have terminated its contract with Braun and
8 sold its rights for more money had it know of Braun's actions. However, the only
9 evidence in the record to support this theory consists of generalized market speculations,
10 such as that there was "serious competition" during the relevant period." *Id.* at 508.
11 Moreover, the Ninth Circuit noted: "California courts have rejected the theory that a party
12 duped into performing an existing contractual obligation has suffered damage." *Id.* (citing
13 *Auerbach v. Great Western Bank*, 74 Cal.App.4th 1172, 1185 (Cal.App.1999)). Finally,
14 the Ninth Circuit noted that while there was evidence that the plaintiff lost three years of
15 development, there was no specific proof of the damage suffered as a result of this loss.
16 *Id.* Accordingly, the district court erred in not granting judgment as a matter of law.

17 Like the attorney in *Braun*, counsel here essentially admitted that there is no
18 competent evidence of damages during his closing argument:

19 But I want to talk to you about damages very briefly. John Tyczki painted
20 12,000 cars, there's true, but ten -- about 10,000 was painted with the AWX
21 system. Every car that he had seen that's come back had dyeback [sic], every
22 car, and he's been fixing them; he's fixed them, he's got people on the
23 waiting list, and he knows there are more coming. Just like these guys all
24 testified that they have; every car that they keep -- get back that they've
25 painted with AWX has dyed back. It's just -- not just limited to John Tyczki.

26 So are we asking that all 10,000 cars be compensated for and -- whether it be
27 by partial -- partial on the breach of contract, the warranty, the fraud claim,
28 the unjust enrichment? No, no, we're not, because we don't know, we can't
 tell how many cars are still on the road, but we -- but we can use our
 common sense and say that perhaps half of them are still out there. And the
 cost of repairing the cars, as you heard initially, was \$2,000 a car, but that
 was two and a half years ago about, and as you saw from the final bills under

1 warranty, that cost has gone up to \$3,200 a car. And you can do the math. If
 2 you go with half the number of cars and you times it by what needs to be
 3 fixed, the 1300, it comes to 16 million. And if you say well, you know, I
 4 don't think it's that many -- you know, don't base it on my experience, you're
the jury -- and it's not that many or it's more, then you can do that math.

5 DE 280, Trial Tr. Day 4 at 239:2-240:9 (emphasis added). Moreover, and again similar to
 6 counsel's argument in *Braun*, counsel here negotiated with the jury and invited them to
 7 speculate what damages Defendants might incur if some fraction of the vehicles they
 8 painted that might still be on the road and might someday be returned for a repaint. DE
 9 280, Trial Tr. Day 4 at 239:2-240:9. This request that the Jury speculate about potential
 10 future damages was unsupported by evidence, and was instead only lawyer argument.
 11 Defendants failed to present an expert to vouch for their calculation, and failed to present
 12 any evidence as to the numbers of cars painted with AWX may still be on the road.⁶

13 In other words, and as in the *Braun* case, Defendants' damage calculation is the
 14 work of speculation, but more so because Defendants' calculation impermissibly
 15 presupposes what some third parties may or may not do. And because these damages are
 16 wildly speculative and not compensable, this Court should enter judgment as a matter of
 17 law in favor of Sherwin-Williams.

18 **E. Alternatively, This Court Should Order a New Trial Because The Damages**
 19 **Awarded Were Excessive And Not Supported by the Evidence**

20 Once a trial court determines that damages are excessive, it has only two
 21 alternatives – either order a new trial, or deny the new trial, conditioned on the prevailing
 22 party accepting a remittitur. *Fenner v. Dependable Trucking Co., Inc.*, 716 F.2d 598, 603
 23 (9th Cir. 1983). The standard for remittitur is the same as that for a motion for new trial
 24 based on excessive damages. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433
 25 (1996). The proper amount of a remittitur is the *maximum amount of damages that can be*
 26 *sustained by the evidence in the record.* *D & S Redi-Mix v. Sierra Redi-Mix &*

27 ⁶ Additionally, and as will be further explained, Defendants' Counsel acted improperly by
 28 negotiating with the Jury on damages and arguing facts not supported by the evidence.

1 *Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982). Here, the Jury's award of
 2 \$3,250,000.00 was excessive based upon the record. Accordingly, Plaintiff submits that if
 3 Defendants provided enough evidence to survive this Motion under Rule 50(b), this
 4 Court should order a new trial, conditioned upon Defendants' rejection of a remittitur.

5 Here, the only possible evidence of compensable damages are the unpaid warranty
 6 claims which Defendants have submitted to Sherwin-Williams, which are \$106,357.07.⁷
 7 DE 279, Trial Tr. Day 3 at 309:9-14; DX 563.⁸ As previously discussed, Defendants'
 8 theory presupposes that all 10,000 cars painted with AWX will need to be repainted at an
 9 average cost of \$2,000 to \$3,200 per vehicle. This cost continuum is based on the
 10 statistically insignificant sample size of 40 vehicles Defendants have repainted since the
 11 start of this lawsuit. Defendants conceded that they do not know if all 10,000 cars need to
 12 be repaired, and submitted no evidence. *E.g.* DE 280, Trial Tr. Day 4 at 53:18-55:13.
 13 Defendants also conceded that if there were no defects on the vehicle (e.g. dieback), then
 14 a repair would be unwarranted. *E.g.* DE 280, Trial Tr. Day 4 at 53:18-55:13. Defendants
 15 also put forth no evidence as to whether all 10,000 vehicles (some of which were initially
 16 painted over seven years before the verdict in 2008) were still even on the road. Finally,
 17 Defendants acknowledged that they have not hired an expert to verify or attest to their
 18 calculation. *E.g.* DE 279, Trial Tr. Day 3 at 337:25-338:2.

19
 20
 21 ⁷ Plaintiff submits that Defendants' so-called reputational damages cannot support the
 22 damages award. While a fraud plaintiff may recover damages for reputational harm, such
 23 damages must be demonstrated with reasonable certainty. *Hardisty v. Moore*, 2015 WL
 24 6393884, at *14 (S.D. Cal. Oct. 22, 2015). For example, reputation damages may be
 25 proven through expert testimony (*Fontana Products Inc. v. Spartech Plastics Corp.*, 6 F.
 26 App'x 591, 595 (9th Cir. 2001)), testimony from others as to the plaintiff's standing in the
 27 community (*Sanders v. Walsh*, 219 Cal. App. 4th 855, 873 (Cal. Ct. App. 2013)); or even
 28 through a loss of customers (*Sanders v. Walsh*, 219 Cal. App. 4th 855, 873 (Cal. Ct. App.
 2013)). Here, Defendants presented no evidence regarding its alleged loss of reputation.

⁸ This figure is calculated by subtracting the cost of the paid warranty claims from the
 total dollar amount stated in the supplemental response to Interrogatory No. 7 on DX 563.

1 From these evidentiary holes, the Jury apparently concluded that an award of
 2 \$3,250,000.00 on the Fraud Claims was proper. Assuming a cost of \$3,200.00 per vehicle
 3 to repair, the Jury apparently found that 1,015 cars will need to be repainted, and
 4 assuming a cost of \$2,000.00 per vehicle, the Jury found that 1,625 cars will need to be
 5 repainted. There is no evidence anywhere in the record to support this conclusion.

6 At trial, Defendants have presented anecdotal testimony that approximately 100
 7 complaints/re-do's were made during the life of the Supply Agreement. However,
 8 Defendants have repeatedly affirmed throughout this lawsuit that they are not seeking
 9 compensation for these pre-lawsuit repaints. *E.g.* DE 223 at 3.

10 Additionally, Defendants presented generic testimony that some 50-65 others are
 11 waiting to have their cars inspected and repaired. *E.g.* DE 279, Trial Tr. Day 3 at 309:15-
 12 310:8. Defendants presented no evidence as to the cost to repair these vehicles, whether
 13 these vehicles in fact needed to be repainted, or whether these cars were even painted
 14 with AWX in the first place. In short, Defendants have never previously disclosed these
 15 vehicles, and could only testify in generalities. Accordingly, these claims are not
 16 compensable. *See Green Wood*, 156 Cal. App. 4th at 777-78. But even if the 100 pre-
 17 termination complaints and the 50-65 future claims are compensable, which they are not,
 18 this does not amount to 1,000+ repaints to support the \$3,250,000.00 damage award.
 19 Accordingly, this Court should remit the damages award to \$106,357.07.⁹

20 **1. The Damages Award on the Fraud Claims Provide Redress for the**
 21 **Same Injury and thus Constitute a Double Recovery**

22 Alternatively, if this Court concludes that Defendants provided enough evidence to
 23 sustain a larger damages award, this Court should nonetheless cap recovery on the three
 24 Fraud Claims at \$1,250,000, total. It is an undeniable truth that litigants are not entitled to
 25

26 ⁹ As Plaintiff will demonstrate more fully, this verdict was the product of improper
 27 conduct. Throughout closing, counsel advocated that the compensatory damage award
 28 Jury was misled that money awarded would be put into escrow for third party customers.

1 a double recovery. “Regardless of the nature or number of legal theories advanced by the
 2 plaintiff, [he or she] is not entitled to more than a single recovery for each distinct item of
 3 compensable damage supported by the evidence. *Ambassador Hotel Co. v. Wei-Chuan*
 4 *Inv.*, 189 F.3d 1017, 1032 (9th Cir. 1999) (*quoting Tavaglione v. Billings*, 4 Cal.4th 1150,
 5 1158–59 (Cal. 1993). “Double or duplicative recovery for the same items of damage
 6 amounts to overcompensation and is therefore prohibited.” *Tavaglione*, 4 Cal. 4th at
 7 1159. Where damage awards are duplicative, the Court should modify the judgment by
 8 striking the duplicative damage award. *See DuBarry Internat., Inc. v. Sw. Forest Indus.,*
 9 *Inc.*, 231 Cal. App. 3d 552, 578 (Cal. Ct. App. 1991) (modifying judgment to strike
 10 duplicative compensatory damages). “Whether a jury award is duplicative is a legal
 11 question.” *Pac. Fuel Co., LLC v. Shell Oil Co.*, 416 F. App’x 607, 610 (9th Cir. 2011).

12 The damages awarded by the Jury for each of the three Fraud Claims
 13 (concealment, intentional misrepresentation, and negligent misrepresentation) are
 14 duplicative.¹⁰ There is no doubt that the Fraud Claims sought redress for the same
 15 injury—the cost to repaint vehicles painted with the AWX product. Indeed, the prayers
 16 for relief in Defendants’ Counterclaims are identical. *E.g.* SACC ¶¶ 47; 55; & 63.

17 Accordingly, the Jury in this case awarded damages multiple times for the same
 18 element of damages under different theories. That the Jury may have awarded different
 19 dollar amounts under different theories is inconsequential. *See, e.g. Pac. Fuel Co., LLC v.*
 20 *Shell Oil Co.*, 416 F. App’x 607, 610 (9th Cir. 2011) (affirming strike of \$468,000
 21 concealment award as duplicative of \$1,000,000 fraud damages because the claims were
 22 presented as a single claims, and based on the same facts and damages). Moreover, that

23
 24 ¹⁰ Initially, this Court also seemed to believe that these damage awards were duplicative.
 25 *E.g.* DE 281, Trial Tr. Day 5 at 9:13-20 (“I had supposed from the pretrial briefing, Mr.
 26 Sorrentino, including yours, that these were simply different ways of asserting the same
 27 claim. I mean I can't imagine that it would garner two awards when the -- you know, one
 28 conduct is intentional, the next is negligent, even understanding that there's some
 differences between those claims. But we'll see what they say. And then, you know, it
 could be subject to any post-trial motions”).¹⁷

the claims are based on different conduct or mental states is irrelevant – plaintiffs are entitled to one recovery for distinct items of damage. *Ambassador Hotel Co.*, 189 F.3d at 1032. There is no evidence presented that Defendants experienced injury as a result of the concealment, which was distinct from the intentional misrepresentation, which was distinct from the negligent misrepresentation. Defendants sought relief for all of the cars they will allegedly have to repaint under alternative theories. Accordingly, this Court should strike the damages awarded, and limit recovery to \$1.25 million.

As previously argued, this Court should remit the damages award to \$106,357.07, since Defendants have not established their damages with sufficient certainty. Alternatively, Plaintiff submits that if this Court concludes that Defendants have put forth sufficient non-speculative evidence of their damages, this Court should strike the awards as duplicative, and award \$1.25 million, given the repetitive nature of these claims.

F. The Verdict Was Not Supported by The Evidence Presented At Trial, But Was a Product of Passion, Prejudice, and Attorney Misconduct

Plaintiff submits that this Court should order a new trial as to liability and damages on the Fraud Claims only because misconduct permeated the trial. “To warrant reversal on grounds of attorney misconduct, the flavor of misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.” *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1286 (9th Cir. 1984) (*quoting Standard Oil Co. of California v. Perkins*, 347 F.2d 379, 388 (9th Cir.1965)). While the failure to timely object may foreclose relief, constant objections are certainly not required, as they could antagonize the jury. *Hern v. Intermedics, Inc.*, 210 F.3d 383 (9th Cir. 2000) (*quoting Kehr*, 736 F.2d at 1286. “In [evaluating the propriety of arguments, courts do not] rely on any of the individual instances or types of impropriety. Rather, [courts] have assessed the argument as a whole. *Draper v. Airco, Inc.*, 580 F.2d 91, 97 (3d Cir. 1978). “A jury which is prejudiced with respect to its finding of liability is not likely to be free from prejudice in awarding damages.” *Id.* Accordingly, a new trial must deal with liability and damages.

Among other issues, Plaintiff submits that Defendants' counsel drew highly inappropriate analogies, argued facts that were not in evidence, mischaracterized Defendants' fraud claims, improperly raised home state/wealth bias, and negotiated with the Jury. While this Court sustained Plaintiff's objections, Plaintiff could not object to each and every instance for fear of further inflaming the Jury. Of the ten hours Defendants were allotted, two hours were dedicated to Defendants' summation. Plaintiff submits that the confluence of these arguments inflamed the Jury against Sherwin-Williams, resulting in the verdict. Counsel's misconduct included the following:

Drawing inappropriate analogies

- During closing argument, Defendants' counsel compared Sherwin-Williams to The Ford Motor Company's conduct in the Pinto Case from the 1970s. DE 280, Trial Tr. Day 4 at 203:14-204:3. This Court described Defense Counsel's statements as "over the top" and "more than rhetorical flourish." DE 280, Trial Tr. Day 4 at 244:20-22. Additionally, this Court recognized that "the difference is between automobiles that were blowing up and immolating people and between paint that's not as shiny as it should be. And reasonable people aren't going to see a connection between those things unless they're inflamed in some way. That's the vice here. That's the vice with it." DE 280, Trial Tr. Day 4 at 245:3-8. Plaintiff requested and received a curative instruction. DE 280, Trial Tr. Day 4 at 243:21-246:13.

Arguing facts that were plainly false¹¹

- Counsel implied that Sherwin-Williams prevented the Jury from viewing evidence. Counsel stated that the Toyota Sequoia (the vehicle at the center of Defendants' claims) must be seen in person to see the dieback, and while Defendants wanted the Jury to see the vehicle, Sherwin-Williams somehow obstructed the Jury from viewing it. DE 280, Trial Tr. Day 4 at 266:12-267:10. Importantly, Defendants never requested

¹¹ Unfounded or inaccurate statements may also serve as grounds to order a new trial. *Hopson v. Riverbay Corp.*, 190 F.R.D. 114, 122 (S.D.N.Y. 1999); *Anheuser-Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 347 (9th Cir. 1995).

1 a jury viewing of the Sequoia, and accordingly, Sherwin-Williams never objected to a
 2 jury viewing. Plaintiff objected to this rhetoric, and the Court reminded the jury that
 3 lawyer statements are not evidence. DE 280, Trial Tr. Day 4 at 266:12-267:10.

- 4 • Defendants twice argued in closing that the first time Sherwin-Williams tested the
 5 effects of humidity on the AWX paint was in 2012. DE 280, Trial Tr. Day 4 at
 6 235:17-235:23; 261:11-262:3. Defendants knew that Sherwin-Williams was only
 7 required to produce testing documents on AWX from 2008 to the present. DE 85 at 6.
 8 Accordingly, it was reckless to argue that the “first” time that Sherwin-Williams
 9 tested for humidity was in 2012, when the limited document production in discovery
 10 started in 2008, which is years after AWX was developed and introduced to market.

11 Arguing facts not in evidence¹²

- 12 • Counsel argued facts related to the Qualtech Toners that were not in evidence. In
 13 response to Plaintiff’s objection, this Court admonished Defendants to not refer to
 14 things outside the evidence. DE 280, Trial Tr. Day 4 at 236:16-237:19. Defendants
 15 compounded their misconduct and argued their expert was unable to perform any
 16 testing because of Sherwin-Williams’ conduct. DE 280, Trial Tr. Day 4 at 238:19-22.
- 17 • Counsel essentially testified as a percipient witness and vouched for his witnesses. DE
 18 280, Trial Tr. Day 4 at 231:17-25 (“I even drove around. That's how I found Bob Stall
 19 Chevrolet, because I'm kind of a Chevy guy, so I said ah, haven't been there in a
 20 while, I got to pick up a part, went in there. Hey, what are you guys spraying with.
 21 Well, we're spraying with this right now, but we used to spray with that. I said I want
 22 to talk to the collision manager, okay, and then I find out this information. That's how
 23 that kind of stuff happens. There's no documentation.”); DE 280, Trial Tr. Day 4 at
 24 232:25-233:8 (“...like Triston Miller, who said no, I never met him. He's never met
 25 me. Shook his hand. Triston Miller's just walk in, tell the truth, I want to ask you a
 26 few questions. I asked you a couple on the phone when I first got him on the phone,

27 ¹² Reference to extraneous evidence during summation can constitute reversible error.
 28 *E.g. Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 210 (3d Cir. 1992).

1 he had to get off quick. I – I knew what the problem was going to be. I asked him,
 2 hey, you got free product too? Yeah, I did. Did you ever get any documentation? No.
 3 They come in, they paint the cars? Yeah. Got documentation? No.”)

- 4 • Implying additional evidence was not shown to the Jury. DE 280, Trial Tr. Day 4 at
 5 203:6-8 (“We have the documents. We went through documents. There's a lot more
 6 documents. We could have been here for probably ten days going through those
 7 boxes”).
- 8 • Implying that other body shops had similar problems, but there was no evidence to
 9 support this. DE 280, Trial Tr. Day 4 at 241:2-6 (“They didn't just do it to him. They
 10 did it to seven body shop owners who showed up and the others who didn't show up
 11 and -- look, they can't be that big of a company...”)
- 12 • Counsel argued that the body shop customers who testified did not know about an
 13 internal SW survey, but this was unsupported. DE 280, Trial Tr. Day 4 at 258:3-16.
- 14 • Counsel also argued that Sherwin-Williams agreed to pay for warranties at Clymer’s
 15 shop. DE 280, Trial Tr. Day 4 at 230:22-231:1. This fact was not in evidence due to
 16 sustained objections. DE 280, Trial Tr. Day 4 at 82:8-83:17. This fact is also irrelevant
 17 and misleading because Defendants implied that Sherwin-Williams has acknowledged
 18 its problems, when the purpose of a settlement is to resolve disputed claims.
- 19 • Counsel argued that painter Arredondo was fired because Sherwin-Williams told
 20 Defendants that their painters were to blame. This fact was not in evidence. *C.f.* DE
 21 280, Trial Tr. Day 4 at 62:2-6; 216:6-14.

22 Mischaracterizing Defendants’ Fraud Claims¹³

- 23 • Argued that the paint labels constituted “fraud, trickery, and plain old dishonesty.” DE
 24 280, Trial Tr. Day 4 at 218:17-219:5. This claim was never raised.

25 ¹³ It is improper to mischaracterize claims for the purposes of inflaming the jury. *See e.g.*
 26 *United States v. Elias*, 285 F.3d 183, 191 (2d Cir. 2002) (improper to mischaracterize
 27 mistaken identity claim as attack on a battered victim). Similarly, here, the actionable
 28 fraudulent inducement has been limited to three discrete statement classifications,
 contrary to Defendants’ counsel’s representations.

- 1 • Argued that the circumstances of the guaranty constitute “fraud and trickery,” and that
2 the guaranty was signed two weeks later. DE 280, Trial Tr. Day 4 at 220:14-20;
3 222:8-14. Defendants have never raised a fraud claim with the Guaranty.
- 4 • Argued that the \$80k/40k switch was fraud: “John Tyczki signed this in reliance upon
5 all of those promises, not -- not the least of which was he thought he was going to get
6 \$80,000, and by the time he found out he was getting 40, it was -- he had spent 120
7 and he was stuck. He would have never opened the shop. Never would have opened
8 the shop.” DE 280, Trial Tr. Day 4 at 221:14-18.
- 9 • Invited the Jury to disregard the jury instructions DE 280, Trial Tr. Day 4 at 213:10-
10 16 (“Now, the Court has ruled that it says what it says, and being intellectually honest,
11 I will tell you I understand what the Court is saying. I can understand. And I am being
12 intellectually honest about it, and I say okay, Judge, I agree. But look at the language
13 because the language explains why John Tyczki believed that everything was
14 included...”).
- 15 • Argued that purchases of all products went towards the completion of the Supply
16 Agreement. DE 280, Trial Tr. Day 4 at 221:25-222:7. This Court has already held that
17 this is not what the Supply Agreements says. DE 173 at 6.
- 18 • Argued that it was fraud that Sherwin-Williams told Defendants that the new shop had
19 buy from Sherwin-Williams. DE 280, Trial Tr. Day 4 at 221:25-222:7. This claim is
20 barred by the parol evidence rule, and has never served as a basis of the Fraud Claims.
- 21 • Defendants argued that it was “fraud” that Sherwin-Williams’ damages under the
22 Supply Agreement were not limited to a return of the Advance. DE 280, Trial Tr. Day
23 4 at 222:15-223:2. Defendants again repeated the argument that Plaintiff’s damages
24 were limited to a return of the Advance. DE 280, Trial Tr. Day 4 at 257:8-13. This
25 argument has been rejected by this Court. DE 173 at 6.

Wealth Disparity Bias¹⁴

- Counsel inflamed the passions of the jury by referencing wealth disparity. DE 280, Trial Tr. Day 4 at 217:25-218:3 (“okay -- this is really important because it tells you how Sherwin-Williams got to be this multibillion dollar company -- it says, The company makes no warranties of any kind relating to the paint systems”); DE 280, Trial Tr. Day 4 at 232:9-11 (“This is a 10 or 20 -- they're a multibillion dollar company, and they don't have even a simple policy like that?”); DE 280, Trial Tr. Day 4 at 233:9-12 (“This is not a sophisticated operation, these small body shops. It's not sophisticated. They're asking them whether they did documentation when the 10, \$20 billion company didn't do documentation”); DE 280, Trial Tr. Day 4 at 233:9-12 (“You're the guys with the getting \$10 billion a year out of your sales. Your policies, you don't have paperwork, you don't have -- your -- your -- you want to blame the body shop owners, the little body shop owners?”); DE 280, Trial Tr. Day 4 at 264:22-25 (“They keep talking about quality control at these little body shops. Well, they're a multibillion dollar company. Why didn't they have quality control? This is evidence. This is evidence.”)

Improperly commented on discovery issues

- During the cross-examination of Dr. Brown on Day 4, Defendants displayed DX 307, which contained properly redacted privileged communications, and asked whether the drafts were “top secret.” DE 280, Trial Tr. Day 4 at 100:13-101:19. This Court sustained Plaintiff’s objection on privilege and relevance grounds. DE 280, Trial Tr. Day 4 at 100:13-101:19. Thereafter, Counsel compounded his misconduct by commenting on the privileged redactions in his closing argument. DE 280, Trial Tr. Day 4 at 211:12-17 (“And then he did six or seven, eight, or nine drafts of his report that we had to work off of, which, by the way, didn't say what he said. And then when

¹⁴ References to wealth disparity are also inappropriate. *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978)

1 I asked about the -- you know, how that was done, oh, it was between emails with me
2 and my attorney. Look. I think we're working with the NSA. Everything's redacted.”).

- 3 • Counsel referred to AEO designations to imply that Sherwin-Williams acted
4 underhandedly. DE 280, Trial Tr. Day 4 at 257:25-258:16; 260:8-16. The designations
5 were made pursuant to a stipulated protective order. DE 35.
- 6 • Defendants also commented on documents that they ostensibly don’t have, but in
7 reality, they never requested in discovery. *E.g.* DE 280, Trial Tr. Day 4 at 232:12-16
8 (commenting on lack of documentation for months of free clear coat allegedly
9 provided to a third-party witness).

10 Hometown Bias¹⁵

- 11 • Throughout the closing, Defendants inflamed the passions of the jury through
12 hometown bias. DE 280, Trial Tr. Day 4 at 218:17-219:5 (“Even the paint label. If
13 that's not fraud, if that's not trickery, if that's not just plain old dishonesty, then what
14 is?...Oh, but it's okay under the laws of the state of Ohio. Well, I say, I say when it
15 comes to fraud -- maybe it is for contract, maybe that's the way they do business there;
16 but I say in California, it's not the way we do business. It's not the way we treat each
17 other.”); DE 280, Trial Tr. Day 4 at 217:16-22 (“In the next column near the bottom --
18 and of course we have the old laws of the state of Ohio -- I guess business is tough in
19 Ohio because I've never seen anything like this...”); DE 280, Trial Tr. Day 4 at
20 241:13-17 (“The only way is to punish them for punitive damages and -- for their
21 conduct because if you don't, if you don't set a standard now here in San Diego right
22 now, this is going to continue”).

23 Jury Nullification/Negotiation

- 24 • With respect to damages, Defendants’ counsel improperly argued that money awarded
25 as compensatory damages would not go to John Tyczki, but would instead go to third-
26 party customers. DE 280, Trial Tr. Day 4 at 239:11-243:2 (“But here’s the key, and

27 ¹⁵ Arguments which incite a hometown bias are improper. *E.g. Whitehead v. Food Max of*
28 *Mississippi, Inc.*, 163 F.3d 265, 277 (5th Cir., 1998).

1 this is really the most important thing to remember about what I'm asking you to do.
 2 This money's not going to John Tyczki. This money is going to fix those cars.... This
 3 isn't money for him. This is money to fix the cars, period. And whatever you give will
 4 be money to fix the cars.”).

- 5 • Defendants further argued that only punitive damages would go to Mr. Tyczki. DE
 6 280, Trial Tr. Day 4 at 239:11-243:2 (“The other item of damages is punitive
 7 damages. Now, punitive damages are something that will go to John Tyczki.”).
- 8 • This Court sustained Plaintiff’s objection: “Hold on a second. That's improper
 9 argument. The damage award is limited to the defendant.” DE 280, Trial Tr. Day 4 at
 10 239:11-243:2.

11 Plaintiff submits that when these statements are taken as a whole, the conclusion is
 12 inescapable that the verdict was the product of inflamed passions and prejudices, and
 13 repeated misrepresentations about what Defendants have actually pled in this case.
 14 Accordingly, a new trial on liability and damages as to the Fraud Claims only is
 15 warranted.

16 **V. CONCLUSION**

17 For the foregoing reasons, Sherwin-Williams requests this Court enter judgment in
 18 its favor, or in the alternative, remit Defendants damages to \$106,357.07, conditioned on
 19 Defendants’ rejection of a new trial, or in the alternative, order a new trial on liability and
 20 damages as to the Fraud Claims.

21 Respectfully submitted,

22 DATED: January 15, 2016

23 YOUNG BASILE HANLON &
 24 MACFARLANE, P.C.

25 By: /s/ Jeffrey D. Wilson

26 Jeffrey D. Wilson

27 Michael M. Jacob

28 Eddie D. Woodworth

Attorneys for Plaintiff, Counter-Defendant

DX 563

Paul F. Sorrentino (SBN 126348)
 John P. Nordlund (SBN 286153)
 JACKSON LEWIS P.C.
 225 Broadway, Suite 200
 San Diego, CA 92101
 Tel: 619.573.4900
 Fax: 619.573.4901
 SorrentinoP@jacksonlewis.com
 John.Nordlund@jacksonlewis.com

Attorneys for Defendants, Counter-Claimants
 JB COLLISION SERVICES, INC. dba
 J&M AUTOBODY dba EL DORADO
 COLLISION; JJT, INC. dba JOHN'S
 COLLISION CENTER; and JOHN TYCZKI

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

THE SHERWIN-WILLIAMS
 COMPANY, f/k/a SHERWIN-WILLIAMS
 AUTOMOTIVE FINISHES CORP.,

Plaintiff,

vs.

JB COLLISION SERVICES, INC., dba
 J&M AUTOBODY, and d/b/a EL
 DORADO COLLISION; and DOES 1
 through 10, inclusive,

Defendants.

Case No.: 13-CV-1946 LAB (WVG)

**DEFENDANT JJT, INC. D/B/A
 JOHN'S COLLISION CENTER'S
 FOURTH SUPPLEMENTAL
 RESPONSES TO PLAINTIFF THE
 SHERWIN-WILLIAMS COMPANY,
 F/K/A SHERWIN-WILLIAMS
 AUTOMOTIVE FINISHES CORP.'S
 INTERROGATORIES, SET ONE**

AND RELATED CROSS-ACTIONS

THE SHERWIN-WILLIAMS
 COMPANY, d/b/a SHERWIN-
 WILLIAMS AUTOMOTIVE FINISHES,

Plaintiff,

vs.

JJT, INC. d/b/a JOHN'S COLLISION
 CENTER; JOHN TYCZKI, and individual;
 and DOES 1 through 10, inclusive,

Defendants.

Case No.: 13-CV-1947 LAB (WVG)

AND RELATED CROSS-ACTIONS

///

**PROPOUNDING PARTY: PLAINTIFF THE SHERWIN-WILLIAMS
COMPANY, f/k/a SHERWIN-WILLIAMS
AUTOMOTIVE FINISHES**

**RESPONDING PARTY: DEFENDANT JJT, INC. d/b/a JOHN'S COLLISION
CENTER**

SET NUMBER: ONE

TO PLAINTIFF AND TO PLAINTIFF'S ATTORNEYS OF RECORD:

Defendant JJT, INC. d/b/a JOHN'S COLLISION CENTER ("Defendant" or "JJT" or "Responding Party") hereby submits the following Fourth Supplemental Responses to Plaintiff THE SHERWIN-WILLIAMS COMPANY, d/b/a SHERWIN-WILLIAMS AUTOMOTIVE FINISHES' ("Plaintiff" or "SHERWIN-WILLIAMS") Interrogatories, Set One, pursuant to Federal Rule of Civil Procedure 33, as follows:

PREFACE

Discovery and investigation are ongoing in this Action. The following Responses are based upon this Defendant's present knowledge with regard to information responsive to Plaintiff's First Set of Interrogatories (the "Interrogatories"). The following Responses are given without prejudice to Defendant's right to produce at a subsequent time, including time of trial, all subsequently discovered evidence and documents relating to the proof of presently known facts and subsequently discovered facts. The information set forth below is true and correct to the best of Defendant's knowledge at this time, but is subject to correction for inadvertent errors or omissions, if any errors or omissions are later found to exist. The right to supplement, modify, or correct these Responses prior to and at trial on the basis of additional discovery and development of facts is expressly reserved.

GENERAL OBJECTIONS

Defendant's Response to each and every Interrogatory is subject to these General Objections. These General Objections form a part of the Responses to each and every Interrogatory and are set forth here to avoid the duplication and repetition involved in restating them for each Response.

1 These General Objections may be referenced specifically in response to certain
2 Interrogatories for the purpose of clarity; however, the failure specifically to incorporate
3 a General Objection should not be construed as a waiver of the Objection.

4 1. Defendant objects to each and every Interrogatory to the extent such
5 Interrogatory seeks information protected from disclosure by various privileges,
6 including, but not limited to, the attorney-client privilege and/or work-product doctrine,
7 and any other applicable statutory, common law, or constitutional privileges.

8 2. Defendant objects to each and every Interrogatory to the extent each such
9 Interrogatory is overbroad, unduly burdensome, and oppressive, and/or seeks information
10 which is neither relevant nor reasonably calculated to lead to the discovery of admissible
11 evidence in this Action.

12 3. Defendant objects to all of the Interrogatories to the extent they are vague
13 and ambiguous, in that the manner in which specific Interrogatories are phrased creates
14 confusion given the issues involved in the litigation.

15 4. Defendant has not completed its discovery, investigation, or trial preparation
16 in this case. Therefore, these Responses are made without prejudice to Defendant's right
17 to present additional evidence or contentions in the trial based upon information
18 hereinafter obtained or evaluated. Defendant reserves the right to supplement or amend
19 its Responses or present additional evidence of contentions at a later date.

20 5. The following Responses are subject to all Objections if such statements are
21 offered in court, and all such Objections are reserved and may be interposed at the time
22 of trial or at any other time. Defendant is not making any incidental or implied
23 admissions regarding the contents of any Response. The fact that Defendant has
24 responded to any Interrogatory should not be taken as an admission that it admits the
25 existence of any fact set forth or assumed by the Interrogatory, or that such Responses
26 constitute admissible evidence. The fact that Defendant has answered any Interrogatory
27 is not intended nor shall be construed to be a waiver by it of all or any part of any
28 Objection to any Interrogatory.

FOURTH SUPPLEMENTAL RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 7:

Identify all instances of YOU were required to repaint vehicles because of alleged quality issues with SHERWIN- WILLIAMS products.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 7:

Responding Party objects on the grounds that this Interrogatory is vague and ambiguous as to the term “required to,” and as to time. Responding Party further objects on the grounds that this Interrogatory is unduly burdensome as Responding Party has been in contact with SHERWIN-WILLIAMS regarding vehicles that Responding Party repainted as a result of the poor quality of SHERWIN-WILLIAMS’ paint products, and, thus, this information is equally available to SHERWIN-WILLIAMS. Additionally, the information will be available in Documents produced by Responding Party in response to SHERWIN-WILLIAMS’ Requests for Production of Documents, which were served concurrently with these Interrogatories, and it is unnecessary and unduly burdensome for Responding Party to undertake the expense and effort of stating it here.

Without waiving said objections and subject to the same, Responding Party responds as follows: Defendant cannot presently recollect all instances in which they repainted vehicles due to quality defects in SHERWIN-WILLIAMS’ automotive paint products as Defendant did not maintain documents memorializing such instances during the term of the Agreement. Defendant only presently recollects instances in which Defendant submitted a warranty claim, as set forth below, as Defendant did maintain documentation of such claims. As to all other instances, Defendant was in communication with Jose Garcia (of Sherwin-Williams) who brought free products to repaint vehicles (“good will adjustments”) but did not leave documentation, although Defendants had to bear the labor costs.

However, Defendant believes SHERWIN-WILLIAMS has possession, custody, or control of documents that would document and/or refresh Defendant’s recollection of said instances in addition to those documents already produced by SHERWIN-

WILLIAMS. Defendant will propound additional discovery requests aimed at requesting said documentation. In addition, Sherwin-Williams marked as “attorney’s-eyes-only” documents that may assist in refreshing Defendants recollection. Defendant reserves its right to supplement this Response if and when its recollection is refreshed and it recalls any further information.

As to those instances that Defendants can presently recollect, Defendant has produced (and will continue to produce as the occurrence of said instances is repeated, continuous, and ongoing) all documents containing that information. Although that information is equally available to SHERWIN-WILLIAMS in the documents already produced (or that will be produced) by Defendants in this matter (including Bates Numbers DEF 16727-816, 16954-56, 16960-80), the following is a list of said presently recollected instances:

#	Amount Owed	Vehicle	Repair Order/ Other Supporting Document	Date Vehicle Out
1.	\$1,109.20	2009 Toyota Camry	RO 2042	September 21, 2013
2.	\$640.92	2013 Kia Optima	RO 2053	September 20, 2013
3.	\$1,286.58	2008 BMW 328I	RO 2054	September 20, 2013
4.	\$1,702.95	2011 Kia Forte	RO 2113	November 29, 2013
5.	\$2,539.35	2011 Toyota Camry	RO 2225	March 21, 2014
6.	\$2,318.58	2005 Scion XB	RO 2226	March 19, 2014
7.	\$1,981.76	2010 Nissan Altima	RO 2227	March 21, 2014
8.	\$2,305.78	2003 Subaru Impreza	RO 2228	March 21, 2014
9.	\$2,503.16	1999 Nissan Altima	RO 2230	March 21, 2014
10.	\$2,094.00	2009 Nissan Altima	RO 2248	April 9, 2014
11.	\$1,182.17	2009 Toyota Camry	RO 2252	April 8, 2014
12.	\$2,510.02	2008 Audi Q7 AWD	RO 2253	April 18, 2014
13.	\$2,708.22	2008 Lexus LS	RO 2270	May 9, 2014
14.	\$3,191.76	1997 BMW 540I	RO 2273	May 8, 2014
15.	\$9,889.23	2004 GMC C1500	RO 2274	May 30, 2014

#	Amount Owed	Vehicle	Repair Order/ Other Supporting Document	Date Vehicle Out
16.	\$1,798.56	2012 Toyota Camry	RO 2295	May 29, 2014
17.	\$1,989.97	2010 Lexus RX350	RO 2377	July 30, 2014
18.	\$935.24	2007 Honda CRV 4X2 EXL	RO 2378	July 23, 2014
19.	\$11,321.33 ¹	2007 Toyota Tundra	RO 2421	September 30, 2014
20.	\$8,360.64	2001 Chevrolet Corvette	RO 2429	September 30, 2014
21.	\$3,456.95	2011 Toyota Camry	RO 2438	September 15, 2014
22.	\$2,112.82	2008 BMW X5	RO 2460	October 28, 2014
23.	\$3,356.01	2005 Cadillac STS	RO 2468	October 24, 2014
24.	\$4,734.24	2009 Toyota Venza	RO 2655	May 17, 2015
25.	\$5,839.49	2006 Acura TL	RO 2656	May 28, 2015
26.	\$4,435.60	2009 Infiniti M35	RO 2657	May 22, 2015
27.	\$9,470.66	1998 Jaguar XK8	RO 17103	April 11, 2014
28.	\$2,139.98	2008 Suzuki XL-7	RO 17858	June 11, 2015
29.	\$2,094.91 ²	2006 Acura TL	RO 22051	October 15, 2012
30.	\$2,490.34 ³	2008 Toyota Sequoia	RO 22336	December 14, 2012
31.	\$1,789.57	2006 Honda Civic	RO 23773	January 10, 2014
32.	\$2,596.25	2008 Honda Civic	RO 23774	January 14, 2014
33.	\$2,634.17	2010 BMW X3	RO 24866	November 26, 2014
34.	\$2,542.48	2003 Mercedes Benz	RO 24868	November 25, 2014
35.	\$2,028.59	2002 Dodge Ram 1500	RO 2782	October 19, 2015
36.	\$4,824.10	2010 Mazda 3	RO 18034	September 18, 2015
37.	\$3,348.07	2012 Ford Fusion	RO 18016	September 3, 2015
	TOTAL:			
	\$122,263.65			

¹ This amount is being paid by Anchor General Insurance. However, Defendant lists this repair as it is evidence of Defendant's allegations regarding the poor quality of SHERWIN-WILLIAMS' automotive paint products and the defects in customer paint jobs caused therefrom.

² SHERWIN-WILLIAMS previously provided warranty reimbursement for warranty work performed.

³ SHERWIN-WILLIAMS previously provided warranty reimbursement for warranty work performed.

1 The need to repaint customer vehicles due to defects in SHERWIN-WILLIAMS'
2 automotive paint and related products is continuous, repeated, and ongoing. Defendant
3 will supplement its document production and this Response as more instances arise.

4 Dated: November 10, 2015

JACKSON LEWIS P.C.

6
7 By: 

8 Paul F. Sorrentino, Esq.

9 John P. Nordlund, Esq.

Attorneys for Defendants, Counter-
Claimants

10 JB COLLISION SERVICES, INC. dba

11 J&M AUTOBODY dba EL DORADO

COLLISION; JJT, INC. dba JOHN'S

12 COLLISION CENTER; and JOHN

TYCZKI

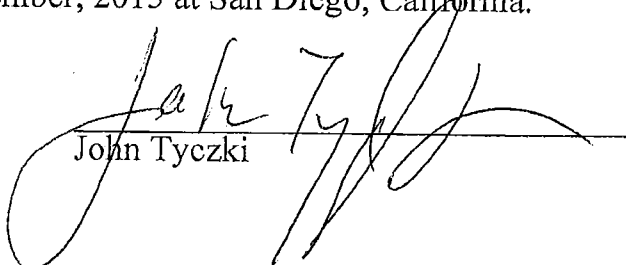
VERIFICATION

I, John Tyczki, declare as follows:

I am an authorized representative of JJT, Inc. d/b/a John's Collision Center ("Defendant"), and have read the foregoing Defendant JJT, Inc. d/b/a John's Collision Center's Fourth Supplemental Responses To Plaintiff The Sherwin-Williams Company, f/k/a Sherwin-Williams Automotive Finishes Corp.'s Interrogatories, Set One. The information set forth in said Responses was gathered and collated by persons regularly in the employ of Defendant and files kept by Defendant in the regular and ordinary course of its business. Said persons have reported to Defendant that said Responses truly and correctly reflect the contents of said records with respect to the subject matter, to the best of their knowledge, wherefore, Defendant states upon information and belief that said Defendant JJT, Inc. d/b/a John's Collision Center's Fourth Supplemental Responses To Plaintiff The Sherwin-Williams Company, f/k/a Sherwin-Williams Automotive Finishes Corp.'s Interrogatories, Set One, are true and correct to the best of my knowledge according to and based upon the records and files of Defendant and information transmitted to Defendant as aforesaid.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 10th day of November, 2015 at San Diego, California.


John Tyczki

4848-2129-5914, v. 1

1 UNITED STATES DISTRICT COURT, SOUTHERN DIST. OF CALIFORNIA

2 CASE NAME: *Sherwin-Williams v. JB Collision*

3 CASE NUMBER: 13-CV-1946 LAB (WVG)

4 Consolidated with

5 CASE NAME: *Sherwin-Williams v. JJT, Inc.*

6 CASE NUMBER: 13-CV-1947 LAB (WVG)

7 PROOF OF SERVICE

8 I am employed in the County of San Diego, State of California. I am over the age
9 of 18 and not a party to the within action; my business address is 225 Broadway, Suite
2000, San Diego, California 92101.

10 On November 10, 2015, I served following document(s) described as:

11 **DEFENDANT JJT, INC. D/B/A JOHN'S COLLISION CENTER'S**
12 **FOURTH SUPPLEMENTAL RESPONSES TO PLAINTIFF THE**
13 **SHERWIN-WILLIAMS COMPANY, F/K/A SHERWIN-WILLIAMS**
14 **AUTOMOTIVE FINISHES CORP.'S INTERROGATORIES, SET**
15 **ONE**

16 on the parties in this action listed below in the manner designated below:

17 Attorneys for Plaintiff

18 Michael K. Murray, Esq.
LANAK & HANNA
625 The City Drive South, Suite 190
Orange, CA 92868
Tel: 714-550-0418
Fax: 714-703-1610
Email: mkmurray@lanak-hanna.com

Attorneys for Plaintiff

Jeffrey D. Wilson, Esq.
Michael M. Jacob, Esq.
Eddie Woodworth, Esq.
YOUNG BASILE HANLON &
MacFARLANE
3001 West Big Beaver Road, Suite 624
Troy, MI 48084
Tel: 248-649-3333
Email: Wilson@youngbasile.com
Jacob@youngbasile.com
woodworth@youngbasile.com

23 ☐ **BY NOTICE OF ELECTRONIC FILING.** The above-listed counsel have
24 consented to electronic service and have been automatically served by the Notice of
25 Electronic Filing, which is automatically generated by CM/ECF at the time said
26 document was filed, and which constitutes service pursuant to FRCP 5(b)(2)(D).

27 ☒ **BY ELECTRONIC MAIL** by transmitting via electronic notification the
28 document(s) listed above to the electronic address set forth above on this date.

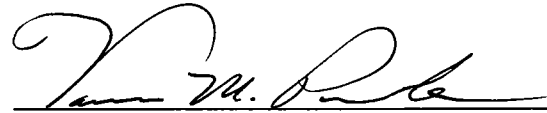
☐ **BY U.S. MAIL** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at San Diego, addressed as set forth above.

☐ **BY OVERNIGHT MAIL** by depositing said document(s) in a box or other facility regularly maintained by the express service carrier providing overnight delivery, addressed as set forth above.

☐ **BY PERSONAL SERVICE** by caused said documents to be hand-delivered to the addressee on November 10, 2015, via First Legal Services, pursuant to code.

☒ **FEDERAL** I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 10, 2015, at San Diego, California.



Vanessa M. Preciado

PROOF OF SERVICE

STATE OF MICHIGAN, COUNTY OF OAKLAND

*The Sherwin-Williams Company v. JB Collision Services, Inc., etc.**Case No.: 13-CV-1946 LAB (WVG)**The Sherwin-Williams Company v. JJT, Inc., etc.**Case No.: 13-CV-1947 LAB (WVG)*

I am employed in the County of Oakland, State of Michigan; I am over the age of eighteen (18) and not a party to the within action; my business address is 3001 W. Big Beaver Road Suite 624, Troy, MI 48084. On January 15, 2016, I served the foregoing document(s) described as **Notice of Motion and Memorandum of Points and Authorities in Support of Plaintiff's Renewed Motion for Judgment as a Matter of Law or Alternatively a Remittitur or Damages/New Trial** on all interested parties to this action by delivering a copy thereof via electronic mail to each of said interested parties at the following address(es):

Paul F. Sorrentino John P. Nordlund Jackson Lewis LLP 225 Broadway, Suite 200 San Diego, CA 92101 Tel: (619) 573-4900 Fax: (619) 573-4901 sorrentinop@jacksonlewis.com john.nordlund@jacksonlewis.com	Attorneys for Defendant/Counter- Claimant JB COLLISION SERVICES, INC. dba J&M AUTOBODY dba EL DORADO COLLISION, JJT, INC. dba JOHN'S COLLISION CENTER; and JOHN TYCZKI
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- ☐ (BY MAIL) I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our firm's office address in Troy, Michigan. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.
- ☒ (BY E-MAIL SERVICE) I caused such document to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth above.
- ☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on January 15, 2016, in Troy, Michigan.

/s/ Jeffrey D. Wilson
Jeffrey D. Wilson